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In the Supreme Court of the United States

OCTOBER TERM, 2000

MARY ANN DiBARI, individually and as lawful guardian of minor children, Krystal M. DiBari and Tiana N. DiBari,

Petitioner,

–v.–

BEDFORD CENTRAL SCHOOL DISTRICT *et al.*,

–and–

ROBERT M. ALTMAN *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should certiorari be granted when the Circuit Court's holding that the Earth Day celebration did not constitute an endorsement of religion was consistent with established First Amendment law and in addition was based upon a factual finding that the challenged activity was not coercive?

2. Should certiorari be granted to modify the well settled rule that a governmental act of compulsion must exist for there to be a violation of the Free Exercise Clause?

3. Should certiorari be granted when the Circuit Court's holding that the petitioner, a municipal taxpayer, lacked standing to challenge school activities was based on a factual finding that petitioner did not show a measurable appropriation or loss of revenue attributable to the challenged activities?

STATEMENT OF THE CASE

The Circuit Court held that the District's annual observation of "Earth Day", a day of activities centered around the theme of conservation of the environment and preservation of the planet, did not violate the Establishment Clause and the Free Exercise Clause of the First Amendment. The Establishment Clause was not violated in that the District's sponsorship of the Earth Day program, which was, in part, an effort to comply with §810 of the New York Education Law that designates the last Friday of April as "Conservation Day", had a secular purpose, students were not compelled to participate in the ceremonies, and a reasonable observer would not find that the ceremonies had the effect of endorsing a religion. There was no violation of the Free Exercise Clause because the Earth Day ceremonies did not have a religion-burdening effect and attendance was not compulsory.

Other challenged activities occurring at the Pound Ridge Elementary School, consisting of assigning elementary school students to make a paper cutout of the elephant-headed Hindu God "Ganesha", the making of "worry dolls" and the sale of "worry dolls" in a school store, and the playing of a tape called 'Listening to Nature" in a class at the Fox Lane Middle

School were dismissed on the ground that at the time of the trial no plaintiff had standing to challenge those activities.[1]

The Circuit Court's holding that the Earth Day ceremonies do not violate the Establishment Clause and Free Exercise Clause of the First Amendment and its dismissal of the claims pertaining to Ganesha, worry dolls and the Listening to Nature tape for lack of standing are the subject of the Petition for Writ of Certiorari.

The Petition for a Writ of Certiorari should be denied because it is mostly comprised of argument that the Circuit Court made erroneous factual findings concerning the nature of the Earth Day ceremonies and the attendance requirement. The decision does not conflict with decisions of other circuits. This Court's well established tests for review of alleged violations of the Establishment Clause and the Free Exercise Clause were recognized and applied by the Circuit Court. The Petition for a Writ of Certiorari represents nothing more than petitioner's disagreement with the Circuit Court's application of the established law to the facts of this case. These are not grounds for the granting of certiorari under Rule 10 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE FACTS

Earth Day

In April of each year, the students and faculty of the Fox Lane High School gather in front of the school for one hour in celebration of "Earth Day". The Earth Day celebration is

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[1] The plaintiffs challenged numerous programs of the District as being in violation of their constitutional rights. The District Court dismissed the majority of their claims except for the Earth Day ceremonies and the three other activities which were eventually dismissed by the Circuit Court for lack of standing.

organized by Youth in Action, a high school club involved in social and environmental activity. (App. 10a).[2] Sean Scorsone ("Scorsone"), a high school senior who was President of Youth in Action, testified that the purpose of the event is "to inform students about the situation with the environment and also to help promote respect for the environment and for each other". (A.877)[3]

In recent years the center of the Earth Day celebration has been a large globe on a tripod which is placed in the circle in front of the school. Drums are played to draw the student body around the globe. (App. 10a). Scorsone testified that senior citizens are invited to attend "to foster respect, to show the school community and show the senior citizens themselves that they are an important part of the community".(A.879). He added that each class presents metaphorical gifts during the celebration such as wisdom, knowledge and respect. (A.879). Traditionally, the faculty advisor, Dale Saltzman ("Saltzman"), makes some opening remarks and guest speakers address the student body. (App. 10a).

Plaintiff Jon DiNozzi testified that at one such event, Saltzman stated, "We come from the Earth, we're part of the Earth and we're all involved in this cycle. One day we'll become them [senior citizens] and then we'll go back to the earth." (A.129). On a second occasion, Saltzman was quoted by Jon DiNozzi as saying, "There's just too many people on this Earth. We need to do something about it." (App. 11a).

Plaintiffs placed into evidence an affidavit from Defendant High School Principal Richard Kraemer ("Kraemer") which had been submitted in support of Defendant's motion for

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[2] App. refers to the appendix of the Petition for Writ of Certiorari.

[3] Refers to the Record before the Circuit Court.

summary judgment. In that affidavit, Kraemer stated that attendance at the Earth Day celebration "is not required." (A.1107 at ¶4). He added that

> The suggestion by Plaintiffs that the observance of Earth Day constitutes the celebration of "Gaiaism the religion of Earth Worship" or otherwise constitutes a religious activity is without any factual basis. There is no religious purpose to this observance and any religious content, if it occurs, is purely incidental. (A.1107 at ¶5).

In an attempt to characterize this benign ceremony as "religious", Petitioner, Mary Ann DiBari ("DiBari") misrepresents the globe on the tripod as an "Earth-totem", the ceremony as a "ritual", and Salzone's remarks as a "sermon". (Petition, pp. 3-4).

DiBari submits as part of a lodging an article written by a student in the school newspaper in an effort to show that the Earth Day ceremonies were religious. (Lodging, p.1).[4] The article, which describes the previous year's ceremonies, noted that "symbolic structures such as the teepee last year, are provided along with a chorus of drums to add to the festivities." DiBari misreports the "chorus of drums" and festivities as "[a] chorus of ceremonial tom-toms played throughout the ritual." (Petition, p. 4)

The student journalist also notes that each year symbolic gifts are given to the Earth by representatives of each class.

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[4] Copies of documents not in the record that shed light on the arguments in a case may be "lodged" with the Court. Robert L. Stern et al., Supreme Court Practice, p. 556 (7th ed. 1993). The documents lodged by the petitioner are trial exhibits which are part of the record. (Petition, p.3, n.1). The documents are therefore improperly "lodged" with the Court.

The "gifts" are merely in the form of a speech. The article reports that previous Earth Day ceremonies included such obvious non-religious events as the celebration of the 50th anniversary of the United Nations wherein 50 students carrying the flags of their representative countries paraded around the circle. Also, a theme of Earth Day the previous year was the conditions of rain forests throughout the world. Students marched around the circle carrying banners displaying the current state of the world's rain forests.

DiBari portrays the theme of Earth Day as "honoring the Earth" as if the District is compelling its students to engage in some type of ritualistic "Earth worship". The student journalist reports otherwise. She states that "the recurring theme that Mr. Saltzman, the coordinator of the Earth Day, has provided for us in all his presentations is that Earth Day is about reflecting on the simple things that the Earth provides for us and maybe, for one day, not taking them for granted."

In an article written by another student journalist reporting on the 1998 Earth Day ceremony, she describes the program as "speeches by several Fox Lane faculty members and a musical performance [by two students]. Presentations of several national flags to add to Fox Lane's collection were made, along with individual presentations of symbolic gifts to the earth presented by the president and vice-president of each class." (Lodging, p.2). A student she interviewed declared: " I enjoyed the ethnic diversity of the multicultural presentation of flags." The student journalist concluded: "[n]o doubt ... students and teachers alike enjoyed the opportunity to take in some fresh air and sunshine, listen to some excellent music, and take a break from their regular routine."

The 1998 Saltzman memorandum to faculty which comprises page 3 of the Lodging is merely a plea to staff to make the students aware of the Earth Day celebration.

Contrary to DiBari's assertion that the entire high school student body attended every year (Petition, p.11), attendance was not required as explained in the Kramer affidavit referenced *supra*. Dibari claims that students were expected to attend the "ritual" in order to have the District's message "reinforced" and "driven home". As depicted in the memorandum, Saltzman notes that the message conveyed at Earth Day ceremonies is merely that there should be an "honoring of the elders" [referring to the senior citizens who attend the ceremonies], and "respect for the Earth".

Ganesha

During the 1992-1993 and 1993-1994 school years, Jacqueline Reizes ("Reizes"), a teacher at the District's Pound Ridge Elementary School, included in her classroom instruction a unit on India and its culture. As part of the India unit, the children were exposed to various aspects of Indian culture including music, art, dance and foods. Reizes decorated her classroom with wall hangings of saris, textiles, travel posters and pictures of Indian life, one of which depicted a statue of Ganesha, an elephant-headed Indian God being carried through the streets of Bombay during the Ganapathy Festival. (App. 7a). Next to the picture was a written description which stated in part:

> Ganesha is a round bellied, good natured Hindu god. He loves to eat.
>
> Those who worship Ganesha bring him gifts of fruit.
>
> Ganesha is the god of wisdom and success. People pray to him before they begin important projects. (A.1098)

Reizes also read to her class a two page story entitled "How Ganesha Got His Elephant Head" as part of the unit on India and its culture. She testified that she was not attempting to promote Hinduism by these activities, and that neither the Ganesha picture or story had any religious significance to her. (A.741-742, 748).

In addition to the foregoing, Reizes engaged her students in an arts and crafts project in which they made construction paper cutouts of Ganesha. (App. 8a). An example of one student's cartoon-like project was admitted into evidence (A.1126). Reizes testified that no religious message was intended by this activity project. When asked why she had chosen Ganesha as an arts and crafts project, Ms. Reizes responded,

> Most children I know really like animals. It could have been a monkey. I could have read another story about a monkey, but I went with elephant. This was a light-hearted craft project which followed the reading of a story. (A. 742-743).

Melissa Landau and J. C. O'Brien, each of whom had been students in Reizes' 1992-93 fourth grade class, testified that the making of a construction paper "Ganesha elephant" had no religious significance to them. (A.763-773).

Reizes stated that she developed the India unit for her third grade class in accordance with the New York State Department of Education third grade social studies curriculum guide. This guide, entitled "Communities Around the World", provides suggested approaches for teaching about individual world communities. For the study of Indian culture, the guide suggests teaching third grade students about the Hindu festival of Diwali which celebrates the homecoming of Rama, reading the story of Rama and Sita, and conducting a mini-Diwali

festival. Finally, the guide suggests as an arts and crafts project, having the students make monkey stick puppets, which represent the "Monkey King" and his army of clever monkeys [who] helped Rama kill the mean King Ravana and rescue Princess Sita." (A.113-129).

Reizes said that in her class she substituted Ganesha for Rama and Sita because it was easier for her to find materials about Ganesha. Her India unit followed the same sequence and general structure as was recommended by the guides, with the construction of a paper Ganesha replacing the "Monkey King" puppet as an arts and crafts project. (A.746-747).

DiBari's claim that Reizes instructed the students to make the images in clay is not supported by the Record. (Petition, p.7). While plaintiffs Krystal and Niki DiBari and Joseph DiNozzi testified that Reizes had instructed her classes to make likenesses of Ganesha out of clay but that these projects were never completed, their testimony was flatly disputed by four other students who had been in either Ms. Reizes' 1992-93 or 1993-94 class (A.764, 770, 774, 785) and by Ms. Reizes who testified that not only had she not given her students such an assignment, but also that such an activity would not be appropriate for third grade students who do not have the manual dexterity to make complex little clay figures. (A.748).

"Worry Dolls"

Several of the infant Plaintiffs, as well as other student witnesses testified that, as elementary school students, they made "worry dolls" as a crafts project in the school's Discovery Center. Similar dolls were sold in the school store. (App. 9a). "Worry dolls" are multicolored little dolls made out of toothpicks, thread and wire with a painted face. (App. 9a). Joseph DiNozzi and Russell Altman testified that they were told by school personnel that if they placed these dolls

under their pillows at night they would ward away bad dreams. (App. 9a). There is no evidence in the record that such comments, if made, were in any way authorized by Defendants. Rachel Ostrow, one of the student witnesses called to testify by Defendants, said that she had been told "that it was Guatemalan culture, that the children there would make a worry doll and put it under their bed and it was supposed to take bad dreams away". She stated, however, neither she nor any members of her class were told to place the "worry dolls" under their own pillow. (A.807, 808).

Listening to Nature Tapes

Plaintiffs introduced into evidence an audio tape entitled "Listening to Nature" which was played to students at the Fox ne Middle School. The District Court, quoting at length from the text of a tape recording entitled "Listening to Nature" found that the tape contained Native American "prayers to Mother Earth" and that the playing of these tapes for students violated the First Amendment in that "this activity was a direct presentation to the children of an Earth-centered religious belief". (App. 146a-148a). The Court's ruling was made despite the fact that there is absolutely no evidence in the record that any student ever heard the prayers, or that it was ever intended that any student hear the prayers. (App. 14a).

The only witness to testify at trial regarding the playing of the tapes was Ruthann Funari, a life science teacher at the Fox Lane Middle School. Ms. Funari testified that she purchased the tape, which was described by the District Court as interspersing "prayers and invocations sonorously uttered along with background sounds of forest and ocean" (A.974) because she wanted to use the nature sounds as background for an in-class writing assignment regarding the natural environment. (A.811-814).

Ms. Funari stated that she played the tape on one occasion in November 1998. She did not introduce the tape before she played it nor did she use the accompanying text in any way. Most significantly, because she only wanted the students to hear the nature sounds and did not intend them to hear the words, she turned down the volume on the tape whenever the voices came on so that only the sounds could be heard. She stated that she did not believe any of the students heard the prayers. (A.816).

The Standing Issue

When this action was commenced, at least one plaintiff was eligible to attend Pound Ridge Elementary School, at least one was attending or eligible to attend Fox Lane Middle School, and at least one was attending or eligible to attend Fox Lane High School. When the case was tried, however, plaintiff Ross Altman was the only plaintiff of elementary-school age; and he and his family had previously moved out of the District. Thus, by the time of the trial, no plaintiff could claim any direct injury from the Ganesha and Worry Doll activities conducted at Pound Ridge Elementary School. (App. 47a).

Similarly, at the time of trial, the only plaintiff attending Fox Lane Middle School was Tiani DiBari. However, she graduated from that school in 1999. Although one or more of the DiNozzi children remained age-eligible to attend the school, the DiNozzi family relocated from the District the day after judgment was entered in the District Court. Thus, no plaintiff could claim any direct injury from the playing of the "Listening to Nature" tape. (App. 48a).

The Circuit Court ruled that Mary Ann DiBari did not have standing as a municipal taxpayer to claims under the Free Exercise Clause because none of the DiBaris could meet the requirement that they assert violations of their own particular

freedoms. (App. 47a). DiBari also lacked standing under the Establishment Clause because there was no showing of a measurable appropriation or loss of revenue attributable to the challenged activities at the schools. (App. 48a-49a).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. Certiorari should not be granted when the Circuit Court's holding that the Earth Day celebration did not constitute an endorsement of religion was consistent with established First Amendment law and in addition was based upon a factual finding that the challenged activity was not coercive.

DiBari argues that due to the "heightened scrutiny" accorded First Amendment claims in the public school setting, the Circuit Court erred in not concluding that the Earth Day ceremonies subtly coerced impressionable students to engage in "Earth Worship" in violation of the Establishment Clause. (Petition, p.16).

There are three tests used by the Supreme Court to determine whether the Establishment Clause has been violated. The first is the three pronged *Lemon* test enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971) wherein the challenged school practice must (1) have a secular legislative purpose, (2) have a principal or primary effect that neither advances nor inhibits religion, and (3) not foster an excessive government entanglement with religion.

The second test, which the Court set forth in Lee v. Weissman, 505 U.S. 577 (1992) is the so-called "Coercion Test" under which school-sponsored religious activity is analyzed to determine the extent, if any, of its coercive effect on students. "Although it is conjunctive, this, too, is a tripartite

test: 'Unconstitutional coercion [occurs] when: (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors.'" Doe v. Beaumont Independent School District, 173 F.3d 274 (5th Cir. 1999), citing Jones v. Clear Creek Independent School District, 977 F.2d 963, 970 (5th Cir. 1992), cert. denied, 508 U.S. 967 (1993).

The third test is known as the "Endorsement Test". It seeks to determine whether the government endorses religion by means of the challenged action. County of Allegheny v. ACL, 492 U.S. 573 (1989).

Under any of these tests, the initial inquiry is whether the challenged activity is "religious" within the meaning of the Establishment Clause. While attempting to define religion in a given case can be a "notoriously difficult" task, Alvarado, v. City of San Jose, 94 F.3d 1223, 1226 (9th Cir. 1996), one circuit court has identified the essential characteristics, or indicia of religious beliefs as follows,

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs. Africa v. Commonwealth of Pennsylvania, 662 F.2d 1025, 1032 (3d Cir. 1981)

As noted by Judge Adams in his concurring opinion in Malnak v. Yogi, 592 F.2d 197, 209 (3d Cir. 1979), the "formal and external signs" include "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays, and other

similar manifestations associated with the traditional religions."

In applying the above analysis, the Ninth Circuit rejected the contention that so-called "New Age" beliefs constituted a religion for Establishment Clause purposes. Alvarado, supra. In so doing, that court noted the absence of any text, creed or associated organized group, stating,

> The New Age proponents cited by plaintiffs clearly indicate that there is no New Age organization, church-like or otherwise; no membership; no moral or behavioral obligations; no comprehensive creed; no particular text, rituals or guidelines; no particular object or objects of worship; no requirement or suggestion that anyone give up the religious beliefs he or she already holds. 94 F.3d at 1229.

Similarly, in Fleischfresser v. Directors of School District 200, 15 F.3d 680 (7th Cir. 1994), the court addressed a claim by various parents that the use of a textbook series which allegedly focused upon "wizards, sorcerers, and unspecified creatures with supernatural powers" violated the Establishment Clause. In rejecting that claim, the court stated,

> The parents insist that the reading series presents religious concepts found in paganism and branches of witchcraft and satanism, this hardly sounds like the establishment of a coherent religion. 15 F.3d at 687.

See also Peloza v. Capistrano Unified School District, 37 F.3d 517, 520 (9th Cir. 1994) (holding that neither evolution nor secular humanism is a religion).

The Earth Day ceremonies are certainly not a formal religious exercise where the recurring theme as noted in one of

the student newspaper articles lodged by the petitioner is respect for one' elders and the environment. While DiBari attempts to portray Earth Day as a form of "Earth Worship" by misrepresenting the annual ceremonies as the "Earth Day Liturgy", the globe on a tripod as an "Earth-totem", speeches as "sermons" and the playing of drums as "ceremonial tom-toms", the record reveals that the day is merely one of environmental and social awareness and appreciation.

The District was not advancing religion at the Earth Day ceremonies. Furthermore, the element of coercion identified in Lee, supra, was also not met in that there was no obligation on the part of the students to participate in the ceremonies. The Kraemer affidavit states that attendance was not mandatory and there is no contrary evidence in the record that students were compelled to attend. To the extent that DiBari claims that the Circuit Court made an erroneous factual finding in concluding that attendance was not mandatory, Rule 10 of the Rules of the Supreme Court provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings ...".

DiBari cites the decision in Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000) in which the Court found that student-led prayers at school football games violated the Establishment Clause, for the proposition that mandatory attendance is not a prerequisite for a determination that students were coerced into participating in the challenged activity. In Santa Fe, attendance at football games was mandated for cheerleaders, members of the band and the team members themselves. For those students who were not mandated to attend, there existed "immense social pressure, or truly genuine desire, felt by many students to be involved in the extra-curricular event that is American high school football." Id. at 292.

The facts in this case do not indicate that the school district created a situation in which students were faced with public pressure or peer pressure to participate in religious activities. *See* Bown v. Gwinnett County School District, 112 F.3d 1464 (11th Cir. 1997) (no pressure to participate in silent meditation during class). It is highly unlikely that students have an overwhelming desire or face public pressure or peer pressure to attend a ceremony in which the focus is on respect for senior citizens and the environment.

In addition, the "impressionability of students" is not relevant if the school is not actually advancing religion. In Good News Club Et Al. v. Milford Central School, ___ U.S. ___, 121 S.Ct. 2093 (2001), the Court, commenting on its decision in Edwards v. Aguillard, 482 U.S. 578 (1987), stated:

> Moreover, we did note that mandatory attendance requirements meant that State advancement of religion in a school would be particularly harshly felt by impressionable students. But we did not suggest that, when the school was not actually advancing religion, the impressionability of students would be relevant to the Establishment Clause issue. Id at 2105.

In analyzing whether there is an endorsement of religion in the public school context, the inquiry must be undertaken from the perspective of an "objective observer in the position of an elementary school student." Brown v. Woodland Joint Unified School District, 27 F.3d 1373, 1378 (9th Cir. 1994), citing Kreisner v. City of San Diego, 1 F.3d 775, 783 (9th Cir. 1993) cert. denied, 510 U.S. 1044 (1994). As noted in Brown, to apply a subjective standard would have a devastating impact on school programs.

> If an Establishment Clause violation arose each time a student believed that a school practice either advanced

> or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a "curriculum review committee" unto himself or herself. 27 F.3d at 1379.

See also Fleischfresser, 15 F.3d at 689 n. 9 (rejecting subjective "impressionable child" standard).

The Circuit Court correctly concluded that no objective observer would perceive the Earth Day ceremonies as a message of endorsement of the Gaia religion or any other religious practice. (App. 57a-59a). The activities were not intended to be religious, which, contrary to DiBari's assertion (Petition, p.16), is extremely relevant in determining the context of a challenged activity. Lynch v. Donnelly, 465 U.S. 668 (1984) (O'Connor, J., concurring in judgment); nor was there any evidence that the District was advancing religion during the Earth Day celebration.

II. Certiorari should not be granted to modify the well settled rule that a governmental act of compulsion must exist for there to be a violation of the Free Exercise Clause.

It is well-settled that in order to prevail on a claim alleging a violation of the Free Exercise Clause of the First Amendment, it must be proven that there was governmental compulsion to engage in conduct that violated the Plaintiffs' religious convictions. Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Board, 450 U.S. 707 (1981); see also Mozert v. Hawkins County Board of Education, 827 F.2d 1058, 1065 (6th Cir. 1987).

As observed by Justice Jackson fifty years ago in McCollum v. Board of Education, 333 U.S. 203 (1948), it is essential to a claim of infringement of a public school student's

free exercise rights that there exist some compulsion to perform a religiously prohibited ritual or make a religiously prohibited affirmation. Noting the large number of separate religious bodies existing in the United States, he wrote:

> If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits. 333 U.S. at 235.

In Mozert v. Hawkins County Board of Education, supra, Plaintiffs alleged that a public school requirement that all students use a prescribed set of reading textbooks which contained material contrary to their religious beliefs violated their rights under the Free Exercise Clause. Finding the element of compulsion absent, the Sixth Circuit denied the free exercise claim,

> The requirement that students read the assigned materials and attend reading classes, in the absence of a showing that the participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on the students' free exercise of religions. 827 F.2d at 1065.

Similarly, in Grove v. Mead, 753 F.2d 1528 (9th Cir. 1985), the Ninth Circuit rejected a "religiously based" parental challenge to a particular classroom reading assignment which the parent argued was offensive to her religious beliefs. The Court concluded that the use of the book at issue was not a religious activity but served a secular educational function. Judge Canby's concurring opinion is particularly apt. He noted that while the Free Exercise Clause "protects individuals from

governmental interference with their religion in the absence of compelling justification (citations omitted), it does not protect the individual from being religiously offended by what the government does". 753 F.2d at 1542. Moreover, "[t]he inevitability of this conflict between Plaintiffs' religious rejection of 'secularism' and the secularization of society suggests why antipathy alone, however sincere, is never enough to sustain a free exercise challenge ... were the free exercise clause violated whenever governmental activity is at variance with sincerely held religious precepts, virtually no governmental program would be constitutionally possible." Id.

In the instant case, the Circuit Court correctly held that no violation of the Free Exercise Clause existed when the students were not compelled to attend the Earth Day ceremonies. A relaxation of the coercion standard when there are "impressionable students" involved, as advocated by DiBari, would invariably give rise to a plethora of Free Exercise challenges to activities which have no religion-burdening effect, but are merely found offensive to a plaintiff's beliefs. None of this Court's rulings suggest that its Free Exercise Clause jurisprudence has gone this far.

III. Certiorari should not be granted when the Circuit Court's holding that the petitioner, a municipal taxpayer, lacked standing to challenge school activities was based on a factual finding that petitioner did not show a measurable appropriation or loss of revenue attributable to the challenged activities.

As noted in the Statement of Case, by the time this action was before the Circuit Court, no plaintiff could claim any direct injury from the "Ganesha" and "worry doll" activities at Pound Ridge Elementary School and the playing of the "Listening to Nature" tape at the Fox Lane Middle School as

the result of aging-out of the school building or moving from the District. In that both the DiNozzi and Altman families relocated from the District, the only remaining plaintiff was DiBari whom the Court found lacked standing as a municipal taxpayer under the Establishment Clause and Free Exercise Clause.

The Circuit Court's decision followed this Court's ruling in Doremus v. Board of Education of Borough of Hawthorne, 342 U.S. 429 (1952). Doremus, the seminal case regarding taxpayer standing to assert a violation of the Establishment Clause, involved a parental challenge to the reading of the Old Testament in a public school. Because the child had graduated from school prior to the appeal, the Court found that no standing existed as a result of the parental relationship. 342 U.S. at 432-433. Turning to the issue of the plaintiffs' status as taxpayers, the Court similarly rejected the argument that such status provided them with standing to raise the Establishment Clause claim, finding the plaintiffs had failed to allege "that this activity [Bible reading] is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school." Id, 433. The Court noted:

> It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference . . . the appellants cannot obtain a decision from this Court by a feigned issue of taxation. Id. 434-435.

In the instant case, it has only been shown that DiBari is a resident and taxpayer whose tax contributions go to support the Bedford Central School District. The record is devoid of any proof as to how her pecuniary interests are impacted by the challenged activities. Likewise, Plaintiffs have never alleged that the challenged activities are supported by any separate tax

or appropriation or that they add any sum whatsoever to the cost of school operations.

"In order to establish state or municipal taxpayer standing to challenge an Establishment Clause violation, a plaintiff must not only show that he pays taxes to the relevant entity, he must also show that tax revenues are expended on the disputed practice." Doe v. Duncanville Independent School District, 70 F.3d 402, 408 (5th Cir. 1995) (emphasis added). See also Cammack v. Waihee, 932 F.2d 765, 770 (9th Cir. 1991); Doe v. Madison School District No. 321, 177 F.3d 789 (9th Cir. 1999).

In Doe v. Madison School District No. 321, supra, a municipal taxpayer contested the reading of a prayer during high school graduation ceremonies. The Court noted that the plaintiff did not identify any tax dollars that defendants spent solely on the graduation prayer. Instead, the plaintiff alleged that defendant spent tax dollars on renting a hall, printing graduation programs, buying decorations, and hiring security guards. "But those are ordinary costs of graduation that the school would pay whether or not the ceremony included a prayer. Therefore, those expenditures cannot establish taxpayer standing." Id., 794. The Court continued:

> This case is legally indistinguishable from Doremus, in which the school's expenditures for teachers' salaries, equipment, building maintenance, and the like were insufficient to confer taxpayer standing despite their indirect support of the Bible reading. Id.

As in the above-cited cases, Plaintiffs do not assert a direct dollars-and-cents injury but rather a religious difference. As Doremus and its progeny make clear, this is insufficient to support a taxpayer standing to raise an Establishment Clause claim.

The decision of the Fourth Circuit in Koenick v. Felton, 190 F.3d 259 (4th Cir. 1999) is factually distinguishable. In that case, a retired teacher and state taxpayer challenged the constitutionality of a statute which provided for paid school holidays of the Friday before Easter and the Monday following. In contrast to the instant case, the plaintiff was able to maintain standing upon a showing that her tax dollars funded the paid, statutory holidays for school employees.

The Court's recitation in ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989), of the principle articulated in Commonwealth of Massachusetts v. Mellon, 262 U.S. 447 (1923), commonly known as Frothingham v. Mellon, that a municipal taxpayer's relationship to the municipality is "direct and immediate", does not compel the conclusion advocated by DiBari that the only injury a municipal taxpayer need show is an improper municipal expenditure. As the Circuit Court noted, "under Frothingham we presume a municipal taxpayer's relationship to the municipality is 'direct and immediate' such that the taxpayer suffers concrete injury whenever the challenged activity involves a measurable appropriation or loss of revenue." (App. 46a). DiBari has utterly failed to show a measurable appropriation or loss of revenue attributable to the challenged activities at the schools.

With respect to DiBari's Free Exercise claim, she has to demonstrate that a particular law or practice has a coercive effect which operates against the plaintiff's practice of his/her religion. Fleischfresser v. Directors of School District 200, 15 F.3d 680, 689 (7th Cir., 1994), citing Abington School District

v. Schempp, 374 U.S. 203, 223. The requirements for standing to challenge state or municipal action under the Free Exercise Clause include proof that particular religious freedoms are infringed. McGowan v. Maryland, 366 U.S. 420 (1960); Abington v. Schempp, 374 U.S. at 225, n.9. Thus, Free Exercise claims, by their very nature, require a plaintiff who has allegedly been subjected to the objected religious activity. A municipal taxpayer who is not directly affected by the alleged religious activity lacks standing to maintain an action under the Free Exercise Clause because his/her interest is only financial. See McGowan, 366 U.S. at 429, 81 S.Ct. at 1106-07; Grove v. Mead School District No. 354, supra.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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